Before the
Federal Communications Commission
Washington, D.C.

In the Matter of Implementation of Section 255 of the Telecommunications Act of 1996 Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities	)	WT Docket No. 96-198

To: The Commission

Reply Comments of the American Foundation for the Blind
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Summary

In implementing the disability access provisions contained in Section 255 of the Communications Act, there is a clear need for the Federal Communications Commission (Commission) to set the "rules of the road." People with disabilities, as well as manufacturers and service providers will not be well served by a complaint-based approach to implementation. Without clear rules and expectations, the complaint process will devolve into an uncertain and inconsistent set of decisions which will establish a collection of access standards in confused and unrelated contexts.

The disability community sought Section 255 in large part because voluntary action and market-based decision-making have not achieved accessible telecommunications technology. Attempting to implement Section 255 by relying on voluntary action cannot ensure that disability access will be achieved in any significant measure by the telecommunications industry.

Each telecommunications manufacturer and service provider has a duty to implement disability access in all of its products and services, if readily achievable. The language of Section 255 is clear and direct in its application to manufacturers and service providers. Section 255(b) and (c) place responsibility for accessibility squarely on "*a* manufacturer" and "*a* service provider." Further, each manufacturer or service provider must consider disability access at all stages of design and implementation of each of its telecommunications products or services and determine to what extent access is readily achievable.

Software is an essential part of an increasing amount of Customer Premises Equipment (CPE) and therefore must be included within the disability access requirements. Likewise, the convergence of multiple functions in telecommunications devices makes it impracticable and unduly burdensome to restrict access to CPE used only for telecommunications.

In determining whether or not a particular access-related action is readily achievable, the Commission must clarify that the resources of a parent company are not exempt. Section 255 intended that manufacturers and service providers undertake comprehensive planning to achieve disability access. This means that all levels of a manufacturer or service provider, especially parent companies, must ensure that access considerations are included in planning and resource allocation.

Introduction

The American Foundation for the Blind (AFB) appreciates the opportunity to provide both initial and reply comments to the Commission concerning the disposition of several issues raised in Section 255 of the Telecommunications Act of 1996. It is our hope that the Commission will move from this Notice of Inquiry (NOI) to a Notice of Proposed Rulemaking to fully implement the disability access provisions which Congress saw fit to include in the Telecommunications Act of 1996.

We do wish to express certain threshold concerns regarding the general issue of filing and the specific handling by the Commission of comments submitted in response to the above captioned NOI. With respect to the filing of comments, AFB urges the Commission to seek ways in which to ensure more complete filing of comments in a standard electronic format. Electronically filed comments are more easily made accessible to individuals whose disabilities hamper their ability to access printed material. In addition, electronic files distributed via the World Wide Web and other sources facilitate participation by members of the public who might not otherwise be able to obtain and review copies of comments.

With regard to the initial comments filed in response to this NOI, there seems to be some discrepancy concerning the timely filing of paper and electronic versions of comments from some members of the disability community. We note that many organizations representing the views of persons with disabilities, as well as individuals themselves, do not have offices in Washington D.C., or one or more law firms to handle their filings with the Commission as is typically the case with most telecommunications companies. While we appreciate Commission efforts to make available all comments received whether or not they were considered to be filed on time, we urge the Commission to take care to ensure that comments delivered by the U.S. mail or through other delivery services are handled in an appropriate and timely fashion. We also encourage the Commission to improve its filing and handling procedures for electronic comments. As we have already stated, these electronic versions are often the only means by which many individuals are able to participate in Commission proceedings.

There Is a Clear Need for the Commission to Set the "Rules of the Road"

Substantial progress is being made by the representatives of the telecommunications industry, consumers with disabilities, and their advocates serving on the U.S. Archtectural and Transportation Barriers Compliance Board (Access Board) Telecommunications Access Advisory Committee in developing process- and performance-oriented accessibility guidelines. For the reasons set forth below, the Commission should review these guidelines and adopt regulations to assist industry and consumers with disabilities alike in implementing the disability access requirements of Section 255.

Without clear "rules of the road," the complaint process will devolve into an uncertain and inconsistent set of decisions which will establish access standards in confused and unrelated

contexts. People with disabilities, as well as manufacturers and service providers will not be well served by this approach.

In its well-argued comments, the National Association of the Deaf drew upon the legislative history and Commission proceedings to establish clear Congressional intent and Commission understanding of the need for Commission regulation to implement Section 255. Because both houses of Congress had specifically called for Commission regulations to implement the disability access provisions of their respective legislation, it is quite clear that it was the intent of Congress for the Commission to take action to implement this new and important area fostering consumer choice and competition. Indeed, the legislative history is quite clear that Commission regulation is necessary and was certainly intended by Congress. The Commission should take every step to ensure that the rule making process for Section 255 follows the same expedited schedules as other rules implementing the Telecommunications Act of 1996.

Commission action is also critical for reasons of parity and to ensure a level playing field among manufacturers and service providers. It appears quite likely that the Telecommunications Access Advisory Committee will include extensive process-oriented guidelines in its recommendations to the Access Board. These recommendations will be used by the Access Board in constructing proposed accessibility guidelines for telecommunications equipment and customer premises equipment. It would be illogical, confusing and anticompetitive for manufacturers to follow a set of processes and strive to achieve certain levels of performance designed to foster disability access while service providers are not provided similar guidance. The Commission recognized this difficulty when it referred in the NOI to resolving accessibility problems where equipment and services converge. Providing manufacturers and service providers with reasonable

and flexible directions with respect to performance and process would ensure parity across the industry and hopefully encourage cooperation among its disparate elements.

Rules adopted by the Commission implementing Section 255 must not be rigid or inflexible. Accordingly, the TAAC is moving toward guidelines which set forth a process to guide covered entities in conducting disability-related access activity and performance objectives to guide such activity. Although these recommendations are not complete, this work does provide a model for subsequent Commission action to fully implement Section 255. For example, the process guidelines will establish general requirements such as documentation of accessibility planning and measures taken including accessibility research, consultation with the disability community, provision of information about access features, testing and verification, support for access features, analysis of access barriers, support for access in procurement and sourcing, and access training for employees. Performance guidelines would establish general principles or access goals which focus on access to communications functions without specifying exactly what designs should be implemented. For example, an individual with a disability must have the ability to access the input, output and documentation functions of a particular product or service. Indeed, the TAAC has developed draft performance guidelines using this approach. For an individual who is blind or severely visually impaired, such a performance requirement might read "Where readily achievable, products must have at least one mode for input and control whose components are locatable, identifiable, and accurately operable without requiring the user to see them. Mechanical elements must also be locatable, identifiable and operable without requiring vision."

Neither the process-oriented guidelines nor the performance goals are rigid, inflexible or harmful to innovation. Implementing such rules should encourage innovation by fostering the development of creative, readily achievable access solutions by the telecommunications industry.

However, we also emphasize that both the process approach and performance goals must be required. Following a sound access-oriented process should result in compliance with Section 255, but only if clear performance goals guide that process.

Voluntary Action and Market-based Decisions Alone Have not Achieved Accessible Telecommunications Technology and Cannot Ensure that the Provisions of Section 255 Will be Implemented.

Many comments from the telecommunications industry referred to examples of improved accessibility for people with disabilities. We applaud the efforts made by many companies to give greater attention to disability access, yet we recognize that the vast majority of new telecommunications technology is not accessible to and usable by people who are blind or visually impaired. In fact, almost all of the examples included in industry comments refer to improvements in relay service and compatibility with hearing aids or text-telephones. These developments may be beneficial, but they illustrate the basic inaccessibility of the traditional voice-grade telephone system. As we argued in our initial comments, telecommunications technology is now increasingly dependent on visual output (video displays) and eye-hand coordination for input (touchpads). People who are blind or visually impaired are being systematically deprived of access to most of this new and critical information technology. It is nearly ten months since Section 255 became law, yet we have found little clear evidence of measures being taken by industry to bring about access in the design, development and fabrication of telecommunications products and services. Recent history such as the problem of access by blind computer users to Microsoft's windows operating systems clearly proves that the absence of enforceable requirements results in haphazard access for those who are blind or visually impaired. Indeed, Microsoft has undertaken substantial improvements in its graphics-oriented PC software, but it has done so, at least in part, because of pressure exerted by state and federal government agencies who were pushed by advocates to

exercise their obligations under Section 508 of the Rehabilitation Act of 1973 which requires the procurement of accessible information technology. Even with this pressure, the access problem is not yet solved, and people who are blind or visually impaired are paying the price in lost opportunities.

Because of these and other concerns on the part of the disability community, Congress was petitioned to include strong disability access provisions in its rewrite of the Communications Act of 1934. Congress responded with Section 255, in order to ensure that disability access in telecommunications was elevated to a national priority. Had Congress believed that the market alone would achieve this goal, it surely would not have included such a specific requirement in the procompetitive rewrite of the Act.

Companies in the telecommunications industry will do what is in their self interest, the same fundamental principle followed by any business in the free marketplace. Education and advocacy by consumers with disabilities will likely bring about improvements in the telecommunications industry's design of telecommunications devices and services. But under a structure which requires only market-based or voluntary action, efforts to improve access for people with disabilities will in the face of more pressing and required priorities be shoved farther down on the "should do" list. Accessible or "universal" design will be supported by market mechanisms, but some "pump priming" is necessary to convince industry to broaden its approach to the design, development and fabrication of telecommunications technology. The enactment of Section 255 provides the disability community with an important lever to help accomplish this "pump priming." It is up to the Commission to provide the appropriate fulcrum on which to balance the needs of the disability community and the telecommunications industry.

Each Telecommunications Manufacturer and Service Provider Has a Duty to Implement Disability Access in All of its Products and Services, if Readily Achievable

Several comments from the telecommunications industry urged the Commission to implement the disability access requirements so that they apply only to the overall telecommunications market, to entire product lines, or to specialized equipment. Each of these arguments is flawed and contravenes the clear intent of Section 255.

Limiting disability access by focusing on the accessibility achieved throughout the overall market would lead to the allocation of responsibility on an amorphous entity - the marketplace - and therefore no individual company would bear any responsibility for implementing disability access. This would create a situation in which everyone collectively is responsible for disability access while no one can be individually shown to have any responsibility. The language of Section 255 is clear and direct in its application to manufacturers and service providers. Section 255, subsections (b) and (c) place responsibility for accessibility squarely on "***a*** manufacturer" and "***a*** service provider." Had the Congress intended to require generalized market-based accessibility, it would surely have required the Commission or some other entity to survey the market and take such steps as necessary to encourage accessibility.

Second, with respect to the argument that disability access should be examined in the context of the entire product line of a particular company, Section 255 is likewise clear regarding its application to all covered equipment and services. Indeed, Section 255(c) requires service providers to ensure that "***the*** service" is accessible. The intent of Section 255 is to provide people who have disabilities with choice and access. This must mean choice among the tremendous variety of telecommunications products and services available to nondisabled consumers.

In supporting such generalized accessibility requirements, Motorola offers the ADA-related example of access to theater seating. Such access is required to be dispersed throughout a theater rather than in all seating areas. This example has no bearing on telecommunications or the interpretation of the coverage of Section 255. To make this example valid, access to theaters would have to be considered in terms of overall access to the theater market or to each individual chain of theaters, e.g., a few theaters in New York, Chicago, and other major cities and perhaps one in smaller communities as well. Instead, ADA provides that each individual theater must ensure access, subject to the appropriate ADA exemptions. Accordingly, each telecommunications product or service must ensure access and use for an individual with a disability, if readily achievable.

We recognize that it will not be readily achievable to make all equipment or services accessible, however, the manufacturer or service provider must consider disability access at all stages of design and implementation of each of its telecommunications products or services and determine to what extent access is readily achievable. It is likely that the move by the telecommunication industry to respond to individual user preferences with "plug-and-play" or modular design will accommodate users with a wide range of needs and abilities.

Finally, other comments have argued that the disability access requirements would best be met through the production of specialized equipment designed for individuals with disabilities. comments submitted by the Consumer Electronics Manufacturers Association includes the most extreme and misguided interpretation of this position: "There is no valid public policy reason why manufacturers and consumers should be required to incur the costs of modifying all equipment when the modification is only required for an estimated 12-20 percent of the customers, at most. Provided that there are adequate retail outlets for specialized equipment, persons with disabilities

will have the ability to purchase the equipment they need regardless of the accessibility of standard equipment."

Fortunately, the plain language of Section 255 is quite clear. The obligation for accessibility is placed first on the manufacturer or service provider in its equipment or services and if this direct access is not readily achievable then the manufacturer and service provider must ensure compatibility with specialized equipment - put in the context of the statute, if not (b) or (c), then (d).

Congress clearly intended that Americans with disabilities must have access to the mainstream of telecommunications technology, for that is where the innovation and rapid deployment of new products and services is taking place. After all, the obvious advantage of mass marketing is the broad distribution of fixed costs such as research and development across a wide consumer base. It is also quite apparent that consumers with disabilities already pay a disproportionate share of the cost of access in the form of high prices for specialized equipment and in the form of lost opportunities because so much critical information technology is not accessible. CEMA's position stands Section 255 on its head and denies the inclusion of people with disabilities as equal participants in our society.

CPE Includes Software

CPE is becoming increasingly software dependent for its operation. Although Congress did not include software in the definition of CPE, as it did in the definition of Telecommunications Equipment, the omission is not related to accessibility requirements. Instead, it appears that Congress specifically included software in the definition of Telecommunications Equipment in order to support interconnectivity and unbundling requirements, i.e., to ensure that competing providers would have access to an incumbent carrier's network-based telecommunications

equipment, including its software elements, to facilitate the ability of new entrants to provide competing services. Because CPE is not subject to unbundling, it was irrelevant for Congress to mention software. Since Congress did not specifically exclude software in the disability access language or the definition of CPE, we urge the Commission to ensure that the disability access requirements extend to the software necessary to operate and use CPE.

It Would be Impracticable and Unduly Burdensome to Restrict Access to CPE Used only for Telecommunications

As many comments have noted, convergence is a key trend in telecommunications technology. Increasingly, the same device may be used as a voice-grade telephone, a fax machine, an e-mail reader and a video program viewer. Indeed, the move toward Internet-based voice telephony blurs the lines even further. Because of this trend toward convergence, telecommunications technology can no longer be divided into categories of basic (telecommunications services) and enhanced (information services). Accordingly the Commission's contamination theory no longer applies, since telecommunications capabilities are unlikely to be tangential in information technology products. It would be potentially anticompetive and certainly burdensome for the Commission to attempt to regulate categories of equipment defined as having only tangential relation to telecommunication.

Readily Achievable

Several comments refer to the DOJ rule implementing the readily achievable provisions of ADA. We urge caution in applying a strict application of this rule since it deals only with the built envionment. It is correct that DOJ set a list of priorities for the implementation of the readily achievable exemption under ADA. This is because the exemption applies to **existing** facilities, whereas the provisions of Section 255 apply to the design, development and fabrication of equipment and the implementation of services. Therefore, the exemption cannot be read as more

than a list of factors to be considered in providing reasonable protection to industry against any possible undue burden from disability access.

Several comments argued for strict limits on the application of the financial resources of a parent corporation to the work of a subsidiary. Some even argued that company product teams with financial responsibility for a product should be the only unit for purposes of the readily achievable exemptions.

The guidance provided by the Department of Justice in the preamble to the final rule on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities (28CFR Part 36) provides the level of flexibility needed to assess responsibility. Here the Department of Justice states: " ...any analysis will depend so completely on the detailed fact situations and the exact nature of the legal relationships involved." However, the preamble goes on to say: " The final rule does, however, reorder the factors to be considered. This shift and the addition of the phrase "if applicable" make clear that the line of inquiry concerning factors will start at the site involved in the action itself. This change emphasizes that the overall resources, size, and operations of a parent corporation or entity should be considered to the extent appropriate in light of the "geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity." This approach is appropriate for the ADA context in which retrofiting to a particular facility is required, if readily achievable. However, in the telecommunications context, the "site" is of less consequence than is the geographic separateness of the parent company and its susidiaries. Likewise a small business exemption is not relevant in this context.

We note that the DOJ interpretation of the assessment of the parent company's financial resources for the purpose of determining whether an action is readily achievable under the ADA should be conducted on a case-by-case basis. However, the Commission must clarify at the outset that the resources of a parent are not necessarily exempt in measuring whether or not disability access is readily achievable. Section 255 intended that manufacturers and service providers undertake comprehensive planning to achieve disability access. This means that all levels of a manufacturer or service provider, especially parent companies, must ensure that access considerations are included in planning and resource allocation. Surely, product teams are expected to devote sufficient resources to other priority considerations. To broadly exempt the financial (or other) resources of parent companies would send a clear message that disability access, in spite of clear Congressional intent, is unimportant.

Several comments from the telecommunications industry also raised concerns about the costs and benefits of making products and services accessible to people with disabilities. Implicit in these comments is the suggestion that only a specific company bears the cost of and (presumably) derives the benefit from creating accessible technology. We wish to point out that individuals with disabilities are keenly interested in access to education, employment, entertainment etc. Increasingly this access depends on telecommunications technology. Accordingly, we urge the Commission to consider the cost of inaccessibility as it considers the cost/benefit impact of disability access. Billions of tax-payer dollars are spent in providing income, medical and other necessary benefits to individuals with disabilities. Billions more are spent on education and employment training. Certainly, ensuring that telecommunications devices and services are accessible may add some costs at first, although we suspect those costs will be minuscule in comparison to the overall resources available to the industry. Ultimately, the costs to

bring about accessibility will be negligible. Failing to ensure access to a wide variety of devices and services will exact a high price on individuals with disabilities and on society.

Complaints; Burden of Proof

Several comments urged the Commission to adopt a complaint resolution approach which would require that complainants must bear the burden of proof in bringing a complaint alleging inaccessibility. It is doubtful that most individuals with disabilities, or their advocates, will possess the required knowledge of an individual company's finances, engineering capabilities, design process, etc., let alone the technical design or platform implemented in a particular product or service in order to meet the burden of proof. Since the knowledge, research and planning was carried out by the defendant, the burden of proof must lie with the defendant and that is all the more reason for the Commission to establish clear regulations setting forth its expectations of the industry. Process-oriented rules set by the Commission are an essential first step in the determination of "good faith effort." The planning and documentation which would be carried out under such a process should also foster initial efforts at informal resolution of complaints, which would be in the best interest of consumers and industry. Ultimately, process guidelines and performance goals (such as those recommended in these comments) would also expedite Commission action to conduct investigation and fact finding efforts.

The American Foundation for the Blind is confident that a Commission regulation which embodies performance and accountability guidelines suggested in this reply will provide the benchmarks necessary to judge equipment and service accessibility in relation to the legislative standards of Section 255 of the Telecommunications Act of 1996. We look forward to working with the Commission and manufacturers and service providers.

Attachment A

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